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IN THE

Supreme Court of the United States

WALTER S. STEVENSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

The petition in this case presents a significant constitutional question of first impression—that is, whether a disabled military retiree, who has few if any connections with the military and does not receive military retired pay, is part of the "land and naval Forces" and subject to court-martial jurisdiction. Respondent does not address this fundamental question but instead sidesteps the issue by raising several unpersuasive procedural arguments. Respondent further confuses the issue by misconstruing the relationship between disabled retirees and the military, as well as the precedent governing their relationship. These arguments should not dissuade the Court from granting the petition and ensuring that more than 93,000 disabled retirees are provided the safeguards associated with an Article III court.

I. THE COURT HAS JURISDICTION OVER THE CASE AND IT IS RIPE FOR REVIEW.

1. Respondent's argument regarding the Court's jurisdiction is unsupported by the plain language of 28 U.S.C. § 1259(3). As respondent concedes (Opp. Br. 7-8), section 1259(3) plainly allows the Court to review "*cases* in which the Court of Appeals for the Armed Forces granted a petition for review." (emphasis added). When the CAAF granted review of petitioner's "case" on May 30, 2007, that grant should have been sufficient for the Court's review.

Respondent neither contests the plain language of section 1259(3), nor challenges the plain meaning of "case." Rather, it argues (Opp. Br. 8) that Article 67a(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a(a), confines the Court's authority to reviewing only "claims" granted by the CAAF. This assertion is not supported by the plain language

of Article 67a(a), which prohibits the Court from reviewing "any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." In other words, the Court does not have the authority to review the CAAF's decision to deny a petition for review. However, Article 67a(a) does not prevent the Court from reviewing cases, like this one, where the CAAF has granted review. Those cases are clearly reviewable under section 1259(3).

While the Court need not look past the plain language of these statutes, *see Bread PAC v. Fed. Election Comm'n*, 455 U.S. 577, 580-81 (1982), the legislative history of section 1259(3) also supports a finding of jurisdiction. This history "makes it clear that the Supreme Court has jurisdiction over any case in which the lower court granted review, even if the grant did not include the particular issue on which the certiorari petition is predicated." Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, *in* EVOLVING MILITARY JUSTICE 150-51 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002). When Congress originally considered the possibility of direct review by the Court, the language limited such jurisdiction to "issues upon which the Court of Military Appeals granted review." *Id.* (citing H.R. 6298, 96th Cong. § 4(a) (1980), *reprinted in Hearings on H.R. 6406 and 6298: Revisions of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process before the Military Personnel Subcomm. of the H. Comm. on Armed Services*, 96th Cong. 39 (1980)). The House of Representatives later rejected the "issue" language and passed a bill allowing the Court to review "cases in which the Court of Military Appeals granted a petition for review." *Id.* (citing H.R. 8188, 96th Cong. § 4(a) (1980)). This broader language ultimately was adopted in 28 U.S.C. § 1259. It clearly shows Congress's intent to allow the Court's

review of "cases"—not "issues"—where the CAAF has granted a petition for review.

2. Respondent mistakenly challenges the ripeness of this case. In so doing, respondent does not and cannot question the Court's authority to review an interlocutory appeal under 28 U.S.C. § 1259. *See Solorio v. United States*, 483 U.S. 435 (1987). Rather, it suggests (Opp. Br. 9-10) that the Court should deny this petition because the CAAF remanded a search warrant issue and has refused to address the constitutional issue in this case. Neither claim is persuasive.

The Court has long granted interlocutory cases, like this one, where the issue on certiorari is "independent of, and unaffected by" the issue being reviewed on remand. *See Brady v. Maryland*, 373 U.S. 83, 84 n.1 (1963) (citations omitted). Respondent does not contest this point, but argues (Opp. Br. 9) that the lower court's decision on the search warrant may moot petitioner's jurisdictional claim. That is not accurate. Regardless of the lower court's decision, without action by the Court, petitioner will be subject to court-martial jurisdiction and the harm caused by that jurisdiction, including a possible retrial. This issue is far from moot.

Moreover, without immediate action by the Court, petitioner may lose the opportunity to raise his jurisdictional issue in a future proceeding on direct review.[1] In similar

[1] Respondent concedes (Opp. Br. 9 n.3) this point, but argues that the jurisdictional claim can be addressed in a collateral proceeding before the Court of Federal Claims. While true, this assertion ignores several key distinctions between direct review and collateral review. In particular, collateral cases are subject to a more stringent standard of review, *see Moore v. United States*, 61 Fed. Cl. 146, 150 (Fed. Cl. 2004) ("this court's review of military proceedings must be extremely deferential."), and petitioner will be denied certain constitutional rights, like the right to counsel. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987).

cases, the Court has been willing to review interlocutory appeals to protect a petitioner's right to review. *See Florida v. Meyers*, 466 U.S. 380, 381 n.* (1984) (granting a case where the State could lose its right to challenge an issue in a future proceeding); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975) (citing *California v. Stewart*, 384 U.S. 436 (1966)). The Court should do the same here.

Finally, respondent makes the unpersuasive argument (Opp. Br. 10) that the petition should be denied because military courts have refused to address the issue. This argument claims as a virtue what actually is a vice. Petitioner has raised the constitutional claim regarding court-martial jurisdiction on five occasions[2] and, on each occasion, military courts have refused to mention or address the issue. By continuing its exercise of court-martial jurisdiction, notwithstanding petitioner's numerous legal challenges, the lower courts have implicitly rejected the arguments raised in this petition. Surely lower courts cannot insulate their decisions from the Court's review by proceeding implicitly rather than ruling directly.[3]

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[2] Petitioner raised the issue in a pre-trial motion to the court-martial judge, on interlocutory appeals to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the CAAF, and on direct appeal to the NMCCA and the CAAF.

[3] Respondent cites *NCAA v. Smith*, 525 U.S. 459, 470 (1999), for the proposition that the Court "ordinarily does not address issues that were passed upon by the courts below." This case is cited out of context. In *Smith*, the Court granted review of the case, reversed the lower court's decision and, as part of a remand order, decided not to address questions that would be litigated on remand. This case does not allow a lower court to evade the Court's review by simply ignoring the issue.

II. DISABLED MILITARY RETIREES ARE NOT PART OF THE "LAND AND NAVAL FORCES."

1. As emphasized in the petition (Pet. 9-10), court-martial jurisdiction is limited to persons who "can be regarded as falling within the term 'land and naval Forces.'" *Kinsella v. United States*, 361 U.S. 234, 240-41 (1960) (quoting U.S. Const. art. I, § 8, cl. 14). In the context of military retirees, the linchpin of such jurisdiction has been the retiree's receipt of military retired pay, which is not only compensation "for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies." *Hooper v. United States*, 326 F.2d 982 (Ct. Cl. 1964) (citations omitted). The retired pay provides the retiree with a "direct connection" to the military. *Id.*

Respondent's brief entirely skips this fundamental issue, but instead cites several cases that support a proposition not being challenged here—that is, if a military retiree receives retired pay, then that retiree is subject to court-martial jurisdiction. *See United States v. Tyler*, 105 U.S. 244 (1881); *McCarthy v. McCarthy*, 453 U.S. 210 (1981); *Closson v. United States*, 7 App. D.C. 460 (App. D.C. 1896); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958). Petitioner does not dispute this holding. However, these cases do not support the respondent's position that a disabled retiree, who does not receive retired pay, is subject to court-martial jurisdiction. There is no legal support for such an argument.

Respondent's brief also fails to recognize historical differences between the treatment of retired officers and retired enlisted personnel. For example, while respondent cites several cases finding jurisdiction over retired officers, *see, e.g.*, *Tyler*, 105 U.S. 244, and *Closson*, 7 App. D.C. 460, these cases do not apply to enlisted personnel. On the contrary, the Court of Claims found that the holding in *Tyler*

was inapplicable to enlisted members because such members had lesser statutory obligations upon their retirement. As the court noted, enlisted members were not "subject to military duty, even at the command of the President. If not subject to military duty, then in what way and for what purpose can it be said that enlisted men on the retired list are part of the Army?" *Murphy v. United States*, 39 Ct. Cl. 178, 180 (Ct. Cl. 1904). In this context, *Tyler* and its progeny are not applicable here.

Ultimately, respondent has failed to provide a reasoned basis for depriving petitioner and 93,000 other disabled retirees of their right to the constitutional safeguards provided by an Article III. These disabled veterans have served their country. They should not be subject to a lifetime of court-martial jurisdiction simply because they were disabled during their service and because they receive compensation from the VA to offset their reduced ability to work. The petition in this case provides more than sufficient cause for a grant of review.

2. Respondent likewise errs by attempting to narrow the harm caused by the lower court's decision.[4] Contrary to these assertions, the constitutional question in this case—whether a disabled retiree who does not receive pay from the military can be subject to court-martial jurisdiction—impacts military retirees on both the temporary disabled retired list (TDRL) and the permanent disabled retired list (PDRL). As noted above, the linchpin of this jurisdictional question is whether the disabled retiree is receiving retired pay. Without

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[4] Respondent wrongly asserts (Opp. Br. I, 7, 11-17) throughout its brief, as well as its version of the question presented, that petitioner is included on TDRL. These assertions are factually inaccurate. As noted in the petition and this reply, respondent was transferred to the PDRL in July 1999 and continues to be assigned to that list.

such pay, as is the case here, then the retiree is not part of the "land and naval Forces." This jurisdictional question is not affected by the retiree's placement on the TDRL or PDRL.

3. Respondent misconstrues the relationship between members on the TDRL and the armed forces. In particular, respondent wrongly asserts (Opp. Br. 15-17) that members on the TDRL are temporarily retired and are expected to return to active duty, if and when their disability subsides. Based on this faulty premise, respondent next argues (Opp. Br. 17) that "the purpose of their [military] compensation . . . is to maintain them at a reduced rate pending a final disposition of their suitability for further military duty." Both arguments lack merit.

Respondent's brief ignores one significant factor: namely, members on the TDRL cannot be involuntarily recalled to active duty, but have to consent to such service. *See* 10 U.S.C. § 1211. In other words, even if their disability subsides, members on the TDRL have no further obligation for military service and, thus, the military cannot reasonably rely on their return. On the contrary, their service is terminated when they are placed on the TDRL. *See Craft v. United States*, 210 Ct. Cl. 170, 185 (Ct. Cl. 1976) ("[w]hen on the temporary retired disability list, a serviceman is actually separated from the military.").

Nor can it be said that disabled retirees receive retired pay as a retainer for future service. Such a claim is not accurate. Disabled retirees receive retired pay to compensate them for their injuries. That is why they are not allowed to receive both military retired pay and disability compensation from the Department of Veterans Affairs (VA). *See* 38 U.S.C. § 5305. It also explains why they are not subject to involuntary recall to active duty.

III. ARTICLE 2(A)(4), UCMJ, DOES NOT ALLOW COURT-MARTIAL JURISDICTION OVER DISABLED RETIREES WHO HAVE WAIVED THEIR RIGHT TO RECEIVE MILITARY RETIRED PAY.

Respondent incorrectly claims (Opp. Br. 10-12) that the plain language of Article 2(a)(4), UCMJ, permits jurisdiction over disabled retirees. Not only does this argument ignore well-established rules of statutory construction, it fails to recognize the impact of petitioner's waiver of his entitlement to military retired pay. These arguments must fail here.

First, respondent ignores the well-established canon of statutory construction that requires courts to avoid treating statutory terms as unnecessary surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Ore.*, 515 U.S. 687, 698 (1995); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)). By interpreting Article 2(a)(4) so that all retirees are subject to jurisdiction, respondent has made the "entitled to pay" language mere surplusage. Had Congress intended such a result, it could have simply provided for jurisdiction over "[r]etired members of a regular component of the armed forces." By adding the "entitled to pay" language, Congress clearly intended to limit the scope of this article. Accordingly, this language must be given effect by recognizing that there are certain retirees, like petitioner, who are not entitled to retired pay and not subject to jurisdiction.

Second, respondent completely ignores the waiver in this case and its impact on petitioner's entitlement. Contrary to respondent's suggestion, a servicemember's entitlement to pay is not some inviolable right that can never be extinguished. That is not true. In fact, in the case cited by

respondent, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-77 (1992), this Court found that while a person may be entitled to certain statutory benefits, those benefits could be forfeited or waived by not complying with the statute. This case is no different. Petitioner waived his right to military retired pay by completing the waiver pursuant to 38 U.S.C. § 5305. That waiver effectively terminated his entitlement to pay, which terminated the military's right to exercise court-martial jurisdiction.

CONCLUSION

For the reasons stated above, and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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